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## Testimony of the National Association of Flood and Stormwater Management Agencies

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Inconsistent Regulation of Wetlands  
and Other Waters Hearing

U.S. House of Representatives  
Transportation and Infrastructure Committee

Water Resources and Environment Subcommittee  
Rep. John Duncan, Chairman

March 30, 2004

I am very pleased to present this testimony on inconsistent regulation of wetlands and other waters on behalf of the National Association of Flood and Stormwater Management Agencies (NAFSMA).

### Background on NAFSMA

NAFSMA represents more than 100 local and state flood control and stormwater management agencies serving a total of more than 76 million citizens and has a strong interest in this important issue.

NAFSMA's members are public agencies whose function is the protection of lives, property and economic activity from the adverse impacts of storm and flood waters. NAFSMA member activities are also focused on the improvement of the health and quality of our nation's waters.

The mission of the association is to advocate public policy, encourage technologies and conduct education programs to facilitate and enhance the achievement of the public service functions of its members. Many of NAFSMA's members are currently involved in ongoing water resources projects with the Corps of Engineers, including flood management and environmental restoration projects.

Since the organization was formed in 1979, NAFSMA has worked closely with the U.S. Army Corps of Engineers and other federal agencies, including the U.S. Environmental Protection Agency and the Federal Emergency Management Agency. Many of our members are local sponsors on Corps-partnered flood control and environmental restoration projects with the Corps. We appreciate this committee's efforts to move a Water Resources Development Act last year and hope that we will see a water resources bill enacted this congressional session. NAFSMA members are on the front line protecting their communities from loss of life and property and therefore the organization is keenly aware that flood management measures are a necessary investment required to prevent loss of life and damages to people's homes and businesses. Flood management has proven to be a wise investment that pays for itself by preserving life and property and reducing the probability of repeatedly asking the federal government for disaster assistance.

### NAFSMA Relationship with the Corps and the U.S. Environmental Protection Agency

Over the past twenty years of NAFSMA's existence, our relationship and the role of our agencies and the Corps of Engineers have changed. Our members are dedicated to looking at both non-structural and structural approaches to flood management. Environmental restoration is a key focus of our member agency missions as well as the Corps. Urban stream restoration and other similar projects have been undertaken and have been quite successful.

NAFSMA participated on both of the U.S. EPA's Stormwater Phase II and Urban Wet Weather Federal Advisory Committees. We continue to work closely with the agency on Phase I and Phase II NPDES Stormwater Management issues.

We are proud of the commitment of our member agencies to protect and restore the environment. The Corps and U.S. EPA are important partners to state and local water resource management agencies in carrying out environmental protection and restoration initiatives.

Throughout the last decade, however, one of the areas where our member agencies have experienced significant roadblocks and expensive and dangerous delays has been that of wetlands regulation. As a result, NAFSMA has been involved in a number of legal activities aimed at assisting our members to carry out their local responsibilities. Our most significant issue has involved the inability of flood control districts and public works agencies to carry out normal routine maintenance on flood control channels, and debris control and detention facilities.

### Tulloch Litigation

In 1993, the Corps of Engineers promulgated a regulation that has come to be known as the Tulloch Rule. The rule resulted from a settlement reached between the government and an environmental group in litigation (the "Tulloch litigation") that challenged the application of the Corps' dredge and fill permitting authority to land clearing and excavation that affected a wetland in the course of a private developer's project. When the Corps translated the terms of the settlement into regulatory language, the significance of the policy changes went well beyond the issues originally in litigation, and had a profound affect on the ability of public agencies to engage in routine maintenance activities. Whereas previously the Corps had not required dredge and fill permits for routine maintenance, under the Tulloch rule virtually any activity that resulted in a redeposit of dredged material in a jurisdictional water or wetland required a permit.

NAFSMA and many other interests challenged the Tulloch rule in litigation in the federal District Court for the D.C. Circuit. That court, and subsequently the U.S. Court of Appeals for the D. C. Circuit, held that the Tulloch rule exceeded the Corps' authority under the Clean Water Act. This sent the issue back to the agencies, and in 1999, the Corps issued an interim regulation that excluded from permit requirements "incidental fallback" from activities that it might otherwise consider jurisdictional. Unfortunately, neither the appellate court's decision, nor the rule which purported to implement it, provided clear and consistent guidance on which public agencies could rely. Questions continue to arise as to what constitutes "fallback" and when it is "incidental". Implementation of these regulatory terms has not been uniform from one case and one Corps district to the next.

Worse, the fundamental question of when the results of routine maintenance activities constitute “additions” to jurisdictional waters, thereby requiring permits, remains very elusive. As a result, public agencies pursuing public functions have no regulatory certainty, and are frequently forced to incur significant delays and added costs before undertaking needed facility maintenance, or alternatively to proceed with needed projects and expose themselves to regulatory and enforcement risks. Current questions about the definition of what activities are jurisdictional remain problematic for flood management agencies trying to keep their systems operable.

In many of the flood control systems in the western United States, natural channels play an integral role in flood protection while supporting habitat and natural water quality functions. The flood control systems in a number of communities were built around and included these natural channels. Unfortunately, in arid and semi arid climates, natural channels lack sufficient flow to maintain a clear waterway and they tend to support thick vegetation growth from bank to bank. If these channels cannot be cleared the community is placed in harm’s way.

The flood risk is very real and at one point, a number of our California member agencies were told by the Federal Emergency Management Agency’s National Flood Insurance Program that any claims due to flooding in these areas where the channels were blocked would be subrogated against the flood control agencies, since the channels had not been adequately maintained. So while two federal agencies were telling the flood control agencies they could not clear the channels, another federal agency was clearly sending the message that the channels must be cleared. FEMA requires local governments to assure the maintenance of flood carrying capacity of flood management projects, such as enlarged channels, as a condition of revising FIRMs to reflect the effects of the projects. At the same time the Corps of Engineers, under its 404 permit process, makes it more difficult and expensive for local governments to perform the required, and necessary, maintenance. FEMA’s Technical Mapping Advisory Council, in its 1998 annual report, encouraged FEMA to work with the Corps of Engineers to develop 404 permit regulations which exempt maintenance of FEMA credited flood management projects.

Many man-made flood management facilities are classified jurisdictional and require permits prior to routine maintenance critical to the public’s health and safety. The current regulations require that if these facilities are allowed to have vegetation established within them, then the responsible public agencies must mitigate for the removal of such vegetation, suffer unnecessary delays, and excessive maintenance and administrative costs. This practice, in essence, promotes the ‘scorched earth policy’. Instead of getting credit for the temporal development of this vegetation between maintenance cycles, public agencies are forced not to allow the establishment of it in the first place to avoid being penalized when the facility requires maintenance. We strongly recommend the establishment of guidance allowing public agencies the ability to properly manage their public infrastructure without having to implement the scorched earth policy. This would provide greater value to the watersheds by

providing water quality functions as well as habitat functions for the species that could use these facilities.

Since the Tulloch decision, NAFSMA has become involved in a number of additional cases that involved Clean Water Act permitting issues. Most recently, NAFSMA filed an amicus brief along with a number of other national water organizations in the case just remanded by the Supreme Court involving the South Florida Water Management District and the Miccosukee Tribe, and the Deaton case, where NAFSMA and a number of regional water agencies requested the Supreme Court to review this case because of our concerns about the possible broadening of permitting jurisdiction.

Unless something changes in the regulatory arena, funds that could be directed to stormwater management activities will need to be directed to meeting legal challenges. The organization like many other national groups urged U.S. EPA and the Corps to issue a rulemaking following the SWANCC decision that would clarify a number of the key definitions used in the regulatory arena. Just coming up with a consistent definition across the federal agencies for such key terms as “navigable waters,” “waters of the United States,” “isolated waters” and “tributaries” would go far in freeing up legal dollars that could be directed toward achieving true environmental benefits. It is also important that a universal understanding of jurisdictional bases related to traditional navigable waters and interstate and foreign commerce be established. Since the process of requiring a 404 permit triggers the involvement not only of U.S. EPA and the U.S. Army Corps of Engineers, but also the U.S. Fish and Wildlife Service, the states in some cases, and the Regional Water Quality Boards in California’s case, just issuing a consistent set of definitions that could be supported by all the agencies would be a much welcomed accomplishment that would help significantly to address such inconsistencies as identified by the U.S. General Accounting Office and others.

NAFSMA was very disappointed that the Administration failed to issue a rulemaking in response to the Solid Waste Agency of Northern Cook County vs. U.S. Army Corps of Engineers Decision, commonly referred to as the SWANCC Decision. We believe the Administration is obliged to adjust its CWA rules to come in line with the Supreme Court’s decision and not dismiss this obligation by a tally of comments as if they were votes on the issue. We are concerned that this was a missed opportunity to clarify some of the very broad and overly subjective definitions that necessarily lead to different interpretations by different permit writers and federal, regional and local agencies.

### General Accounting Office Report

The report from the General Accounting Office on Waters and Wetlands dated February 2004 clearly demonstrates numerous differences between 16 Corps District offices in the interpretation of what constitutes a jurisdictional waters of the US. NAFSMA members can attest to these differences, especially those of us within the arid southwest. Within our

generally dry region, jurisdictional delineations have gone so far as to determine that stormwater running down a paved street makes that street jurisdictional and warrants mitigation if that water is placed in a storm drain. Agricultural drainage ditches constructed by farmers within areas that historically had flows traversing in a sheet flow condition, have also been classified as jurisdictional and an ephemeral river. This “river” which only receives flows in direct response to rainfall, has had its 20 year floodplain classified as problematic and potentially jurisdictional, despite the absence of any ordinary high water mark, hydric soils, hydrology or hydric vegetation beyond that found within the minimal levees where stormflows are confined.

The report points to various differences within the Corps’ Districts. While we believe that is true, significant differences can occur within the Districts themselves depending on which staff member is working on your project. This is due to the lack of uniform guidance on the definition of waters of the U.S., what constitutes an ordinary high water mark, and for the implementation of jurisdictional delineations. We recognize that the need for regional differences is important and support the establishment of clear guidance to provide uniformity within regions and districts and consistency that reflect the true intent of the Clean Water Act.

NAFSMA members understand that environmental issues must be addressed and/or mitigated to allow flood control projects to be constructed. One of NAFSMA’s concerns has been the reasonable application of Section 404 permits and their related requirements nationwide.

NAFSMA’s flood management policies state the following:

NAFSMA supports the development of reasonable guidelines, standards and mitigation requirements that recognize regional differences.

NAFSMA supports the practice of including federal permitting as a part of operation and maintenance manuals upon turnover of federal projects to local sponsors and the use of a watershed or watercourse plan that allows the local agency to perform the required maintenance and/or construction of locally financed flood management facilities without the need to obtain additional federal permits.

NAFSMA encourages the Corps of Engineers to better coordinate with all local, state and Federal agencies to streamline the issuance of Federal permits.

NAFSMA supports adequate funding of resources for regulatory permitting. Although NAFSMA supports many of the changes outlined by the Corps in the USACE 2012

report, the organization is concerned that recent changes will further stretch the Corps ability to process much needed regulatory permits.

NAFSMA supports the General Accounting Office's recommendation for the Corps to survey its Districts to solicit information on differing approaches to determining wetlands jurisdiction, but we urge that national stakeholder groups representing those impacted by these decisions to play a role in the interpretation and understanding of the findings. NAFSMA would welcome the opportunity to participate in a national stakeholder discussion of these issues.

I welcome questions and also urge you to contact Executive Director Susan Gilson at 202-218-4133 for additional information.